

# **Applicable Laws, Regulations, Policy, and Planning Criteria**

When considering the affected environment, physical, biological, economic, and social environmental factors must be considered. In addition to NEPA there are other environmental laws as well as Executive Orders (EOs) to be considered when preparing EAs and EISs. These laws are summarized below.

## **Clean Air Act (CAA) of 1970 and Amendments of 1977 and 1990**

The CAA recognizes that increases in air pollution result in danger to public health and welfare. To protect and enhance the quality of the Nation's air resources, the CAA authorizes the Environmental Protection Agency (EPA) to set six National Ambient Air Quality Standards (NAAQSs) which regulate carbon monoxide, lead, nitrogen dioxide, ozone, sulfur dioxide, and particulate matter pollution emissions. The CAA seeks to reduce or eliminate the creation of pollutants at their source, and designates this responsibility to State and local governments. States are directed to utilize financial and technical assistance as well as leadership from the Federal government to develop implementation plans to achieve NAAQS. Geographic areas are officially designated by the EPA as being in attainment or nonattainment to pollutants in relation to their compliance with NAAQS. Geographic regions established for air quality planning purposes are designated as Air Quality Control Regions (AQCR). Pollutant concentration levels are measured at designated monitoring stations within the AQCR. An area is designated as unclassifiable where insufficient monitoring data exists. Section 309 of the CAA authorizes the EPA to review and comment on impact statements prepared by other agencies.

An agency should consider what effect an action may have on NAAQS due to short-term increases in air pollution during construction as well as long-term increases resulting from changes in traffic patterns. For actions in attainment areas, a Federal agency may also be subject to EPA's Prevention of Significant Deterioration (PSD) regulations. These regulations apply to new major stationary sources and modifications to such sources. Although few agency facilities will actually emit pollutants, increases in pollution can result from a change in traffic patterns or volume. Section 118 of the CAA waives Federal immunity from complying with the CAA and states all Federal agencies will comply with all Federal and State approved requirements.

## **Clean Water Act (CWA) of 1977**

The CWA, a 1977 amendment to the Federal Water Pollution Control Act of 1972, is administered by the EPA and sets the basic structure for regulating discharges of pollutants into U.S. waters. The CWA requires the EPA to establish water quality standards for specified contaminants in surface waters and forbids the discharge of pollutants from a point source into navigable waters without a National Pollutant Discharge Elimination System (NPDES) permit. NPDES permits are issued by EPA or the appropriate State if it has

assumed responsibility. Section 404 of the CWA establishes a Federal program to regulate the discharge of dredged and fills material into waters of the United States. Section 404 permits are issued by the US Army Corps of Engineers (USACE). Waters of the United States include interstate and intrastate lakes, rivers, streams, and wetlands which are used for commerce, recreation, industry, sources of fish, and other purposes. The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Each agency should consider the impact on water quality from actions such as the discharge of dredge or fill material into U.S. waters from construction, or the discharge of pollutants as a result of facility occupation.

#### Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 and the Superfund Amendments and Reauthorization Act of 1986 (SARA)

CERCLA authorizes the EPA to respond to spills and other releases of hazardous substances to the environment, and authorizes the National Oil and Hazardous Substances Pollution Contingency Plan. CERCLA also provides a Federal "Superfund" to respond to emergencies immediately. Although the "Superfund" provides funds for clean up of sites where potentially responsible parties (PRPs) cannot be identified, the EPA is authorized to recover funds through damages collected from responsible parties. This funding process places the economic burden for cleanup on polluters. SARA mandates strong cleanup standards, and authorizes the EPA to use a variety of incentives to encourage settlements. Title III of SARA authorizes the Emergency Planning and Community Right to Know Act (EPCRA), which requires facility operators with "hazardous substances" or "extremely hazardous substances" to prepare comprehensive emergency plans and to report accidental releases. EO 12856, "Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements," requires Federal agencies to comply with the provisions EPCRA. If a Federal agency acquires a contaminated site it can be held liable for clean up as the property owner/operator. A Federal agency can also incur liability if it leases a property, as the courts have found lessees liable as "owners." However, if the agency exercises due diligence by conducting a Phase I Environmental Site Assessment, it may claim the "innocent purchaser" defense under CERCLA. According to Title 42 United States Code (USC) 9601(35), the current owner/operator must show it undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice" before buying the property to use this defense.

#### Resource Conservation and Recovery Act (RCRA) of 1976

RCRA, an amendment to the Solid Waste Disposal Act, authorizes the EPA to provide for "cradle-to-grave" management of hazardous waste, and sets a framework for the management of non-hazardous municipal solid waste. Under RCRA, hazardous waste is controlled from generation to disposal through tracking and permitting systems, and restrictions and controls on the placement of waste on or into the land. Under RCRA, a waste is defined as hazardous if it is ignitable, corrosive, reactive, toxic or listed by the EPA as being hazardous. With the 1984 Hazardous and Solid Waste Amendments (HSWA), Congress targeted stricter standards for waste disposal and encouraged pollution prevention by prohibiting the land

disposal of particular wastes. The HSWA amendments strengthen control of both hazardous and nonhazardous waste and emphasize the prevention of pollution of groundwater.

### **Safe Drinking Water Act (SDWA) of 1974**

The SDWA establishes a Federal program to monitor and increase the safety of all commercially and publicly supplied drinking water. Congress amended the SDWA in 1986, mandating dramatic changes in nationwide safeguards for drinking water and establishing new Federal enforcement responsibility on the part of the EPA. The 1986 amendments to the SDWA require the EPA to establish Maximum Contaminant Levels (MCLs), Maximum Contaminant Level Goals (MCLGs) and Best Available Technology (BAT) treatment techniques for organic, inorganic, radioactive, and microbial contaminants, and turbidity. MCLGs are maximum concentrations below which no negative human health effects are known to exist. The 1996 amendments set current Federal MCLs, MCLGs, and BATs for organic, inorganic, microbiological, and radiological contaminants in public drinking water supplies.

### **Federal Land Policy and Management Act (FLPMA) of 1976**

FLPMA and the regulations contained in 43 CFR Part 1600 govern the Bureau of Land Management planning process. Land Use Plans ensure that public lands are managed in accordance with the intent of Congress as stated in FLPMA, under the principles of multiple use and sustained yield. As required by FLPMA, the public lands must be managed in a manner that protects the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition, that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use by encouraging collaboration and public participation throughout the planning process. In addition, the public lands must be managed in a manner that recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands.

### **Taylor Grazing Act of 1934, as amended and supplemented.**

The Taylor Grazing Act was the Federal government's first effort to regulate grazing on federal public lands. The act established grazing districts of vacant, unappropriated and unreserved land from any parts of the public domain, excluding Alaska, which are not national forests, parks, and monuments, Indian reservations, railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which are valuable chiefly for grazing and raising forage crops. Residents and stock owners pay an annual fee to obtain a grazing permit which is used to manage livestock grazing in established districts. Grazing Administration Regulations (43 CFR 4100) provide for the development of state Standards for Rangeland Health and Guidelines for Grazing Management. The Standards and Guidelines are approved through Bureau of Land Management planning and NEPA processes.

### **Public Rangelands Improvement Act of 1978**

The Public Rangelands Improvement Act was instituted to improve the conditions on public rangelands. Rangelands are defined as lands administered by the Secretary of the Interior through the Bureau of Land Management or the Secretary of Agriculture through the Forest Service in 16 contiguous western states, including Arizona, on which there is domestic livestock grazing or which the appropriate Secretary determines may be suitable for domestic livestock grazing. Rangeland quality is determined by soil quality, forage values, wildlife habitat, watershed and plant communities, the current state of vegetation in a site in relation to its potential, and the relative degree to which the kinds, proportions, and amounts of vegetation in a plant community resemble the desired plant community. The act requires a national rangelands inventory and consistent federal management policies. In addition, the act provides funding for range improvement projects.

### **Toxic Substance Control Act (TSCA) of 1976**

Title I of the Toxic Substance Control Act established requirements and authorities to identify and control toxic chemical hazards to human health and the environment. TSCA authorized the EPA to gather information on chemical risks, require companies to test chemicals for toxic effects, and regulate chemicals with unreasonable risk. TSCA also singled out polychlorinated bi-phenyls (PCBs) for regulation and as a result are being phased out. TSCA and its regulations govern the manufacture, processing, distribution, use, marking, storage, disposal, clean-up, and release reporting requirements for numerous chemicals like PCBs. PCBs are persistent when released into the environment and accumulate in the tissues of living organisms. They have been shown to cause adverse health effects on laboratory animals and may cause adverse health effects in humans. TSCA Title II provides statutory framework for "Asbestos Hazard Emergency Response," which applies only to schools. TSCA Title III, "Indoor Radon Abatement," states indoor air in buildings of the United States should be as free of radon as the outside ambient air. Federal agencies are required to conduct studies on the extent of radon contamination in buildings they own. TSCA Title IV, "Lead Exposure Reduction," directs Federal agencies to "conduct a comprehensive program to promote safe, effective, and affordable monitoring, detection, and abatement of lead-based paint and other lead exposure hazards." Further, any Federal agency having jurisdiction over a property or facility must comply with all Federal, State, interstate, and local requirements concerning lead-based paint.

### **EO 11988, "Floodplain Management," May 24, 1977**

EO 11988 directs agencies to consider alternatives to avoid adverse effects and incompatible development in floodplains. An agency may locate a facility in a floodplain if the head of the agency finds there is no practicable alternative. If it is found there is no practicable alternative, the agency must minimize potential harm to the floodplain, and circulate a notice explaining why the action is to be located in the floodplain prior to taking action. Finally, new construction in a floodplain must apply accepted floodproofing and flood protection to include elevating structures above the base flood level rather than filling in land.

## **EO 11990, "Protection of Wetlands," May 24, 1977**

EO 11990 directs agencies to consider alternatives to avoid adverse effects and incompatible development in wetlands. Federal agencies are to avoid new construction in wetlands, unless the agency finds there is no practicable alternative to construction in the wetland, and the proposed construction incorporates all possible measures to limit harm to the wetland. Agencies should use economic and environmental data, agency mission statements, and any other pertinent information when deciding whether or not to build in wetlands. EO 11990 directs each agency to provide for early public review of plans for construction in wetlands.

## **Pollution Prevention Act (PPA) of 1990**

The PPA encourages manufacturers to avoid the generation of pollution by modifying equipment and processes, redesigning products, substituting raw materials, and making improvements in management techniques, training, and inventory control. EO 12856, "Federal Compliance with Right-to Know Laws and Pollution Prevention Requirements," requires Federal agencies to comply with the provisions of the PPA, and also requires Federal agencies to ensure all necessary actions are taken to prevent pollution. In addition, in Federal Register Volume 58 Number 18 (January 29, 1993), the Council on Environmental Quality provides guidance to Federal agencies on how to "incorporate pollution prevention principles, techniques, and mechanisms into their planning and decision making processes and to evaluate and report those efforts, as appropriate, in documents pursuant to NEPA."

## **Biological Factors**

### **Endangered Species Act (ESA) of 1973**

The ESA establishes a Federal program to conserve, protect and restore threatened and endangered plants and animals and their habitats. The ESA specifically charges Federal agencies with the responsibility of using their authority to conserve threatened and endangered species. All Federal agencies must insure any action they authorize, fund or carry out is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction of critical habitat for these species, unless the agency has been granted an exemption. The Secretary of the Interior, using the best available scientific data, determines which species are officially endangered or threatened, and the U.S. Fish and Wildlife Service (FWS) maintains the list. A list of Federal endangered species may be obtained from the Endangered Species Division, U.S. Fish and Wildlife Service (703-358-2171). States may also have their own lists of threatened and endangered species which may be obtained by calling the appropriate State Fish and Wildlife office. Some species, such as the bald eagle, also have laws specifically for their protection (e.g., Bald Eagle Protection Act).

## **Migratory Bird Treaty Act of 1918, amended in 1936, 1960, 1968, 1969, 1974, 1978, 1986, and 1989**

The Migratory Bird Treaty Act implements treaties and conventions between the United States, Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Unless otherwise permitted by regulations, the Act makes it unlawful to pursue, hunt, take, capture or kill; attempt to take, capture or kill; possess, offer to or sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not. The Act also make it unlawful to ship, transport or carry from one state, territory or district to another, or through a foreign country, any bird, part, nest or egg that was captured, killed, taken, shipped, transported or carried contrary to the laws from where it was obtained; and import from Canada any bird, part, nest or egg obtained contrary to the laws of the province from which it was obtained. The U.S. Department of the Interior has authority to arrest, with or without a warrant, a person violating the Act.

## **EO 13186, “Conservation of Migratory Birds”, January 10, 2001**

EO 13186 creates a more comprehensive strategy for the conservation of migratory birds by the Federal government. The Order provides a specific framework for the Federal Government’s compliance with its treaty obligations to Canada, Mexico, Russia, and Japan. The Order provides broad guidelines on conservation responsibilities and requires the development of more detailed guidance in Memoranda of Understanding (MOU) within 2 years of its implementation. The Order will be coordinated and implemented by the Fish and Wildlife Service. The MOU will outline how Federal agencies will promote conservation of migratory birds. The Order will requires the support of various conservation planning efforts already in progress; incorporation of bird conservation considerations into agency planning, including NEPA analyses; and reporting annually on the level of take of migratory birds.

## **EO 11514, "Protection and Enhancement of Environmental Quality," March 5, 1970**

EO 11514 states the President, with assistance from the CEQ, will lead a national effort to provide leadership in protecting and enhancing the environment for the purpose of sustaining and enriching human life. Federal agencies are directed to meet national environmental goals through their policies, programs, and plans. Agencies should also continually monitor and evaluate their activities to protect and enhance the quality of the environment. Consistent with NEPA, agencies are directed to share information about existing or potential environmental problems with all interested parties, including the public, in order to obtain their views.

## **Economic and Social Factors: Environmental Quality Improvement Act (EQIA) of 1970**

The EQIA ensures each Federal agency conducting or supporting public works activities affecting the environment implements policies established under existing law. The EQIA also created the Office Environmental Quality to provide professional and administrative staff for the Council on Environmental Quality (CEQ). The Director of the Office of Environmental

Quality assists and advises the President on Federal policies and programs affecting environmental quality. The Office of Environmental Quality reviews the adequacy of existing environmental monitoring and predicting systems, and assists Federal agencies in appraising the effectiveness of existing and proposed facilities which affect environmental quality.

### **National Historic Preservation Act (NHPA) of 1966**

The NHPA sets forth national policy to identify and preserve properties of state, local, and national significance. The act establishes the Advisory Council on Historic Preservation (Council), State Historic Preservation Officers, and the National Register of Historic Places (NRHP). The Council advises the President, Congress and Federal agencies on historic preservation issues. Section 106 of the act directs Federal agencies to take into account effects of their undertakings (actions and authorizations) on properties included in or eligible for NRHP. Section 110 sets inventory, nomination, protection and preservation responsibilities for federally owned cultural properties. Section 106 of the act is implemented by regulations of the Council, 36 CFR Part 800. The Bureau of Land Management in Arizona complies with Section 106 according to a national Programmatic Agreement dated March 26, 1997, supplemented by a Protocol between the BLM Arizona State Director and the Arizona State Historic Preservation Officer.

The agency should coordinate studies and documents prepared under Section 106 with NEPA where appropriate. However, NEPA and NHPA are separate statutes and compliance with one does not constitute compliance with the other. For example, actions which qualify for a categorical exclusion under NEPA may still require Section 106 review under NHPA. It is the responsibility of the agency official to identify properties in the area of potential effects, and whether they are included or eligible for inclusion in the National Register of Historic Places. Section 110 of the NHPA requires Federal agencies to identify, evaluate, and nominate historic property under agency control to the National Register of Historic Places.

### **Archaeological Resource Protection Act (ARPA) of 1979**

ARPA protects archaeological resources on public and Indian lands. It provides felony-level penalties for the unauthorized excavation, removal, damage, alteration or defacement of any archaeological resource, defined as material remains of past human life or activities which are at least 100 years old. Before archaeological resources are excavated or removed from public lands, the Federal land manager must issue a permit detailing the time, scope, location and specific purpose of the proposed work. ARPA also fosters the exchange of information about archaeological resources between governmental agencies, the professional archaeological community, and private individuals. ARPA is implemented by regulations found in 43 CFR Part 7.

### **American Indian Religious Freedom Act of 1978 and Amendments of 1994**

The American Indian Religious Freedom Act of 1978 recognizes that freedom of religion for all people is an inherent right, and traditional American Indian religions are an indispensable

and irreplaceable part of Indian life. It also recognized the lack of Federal policy on this issue and made it the policy of the United States to protect and preserve the inherent right of religious freedom for Native Americans. The 1994 Amendments provide clear legal protection for the religious use of peyote cactus as a religious sacrament. Federal agencies are responsible for evaluating their actions and policies to determine if changes should be made to protect and preserve the religious cultural rights and practices of Native Americans. These evaluations must be made in consultation with native traditional religious leaders.

### **Native American Graves Protection and Repatriation Act (NAGPRA) of 1990**

NAGPRA establishes rights of Indian tribes to claim ownership of certain “cultural items”, defined as Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, held or controlled by Federal agencies. Cultural items discovered on Federal or tribal lands are, in order of primacy, the property of lineal descendants, if these can be determined, the tribe owning the land where the items were discovered, of the tribe with the closest cultural affiliation with the items. Discoveries of cultural items on Federal or tribal land must be reported to the appropriate Indian tribe and the Federal agency with jurisdiction over the land. If the discovery is made as a result of a land use, activity in the area must stop and the items must be protected pending the outcome of consultation with the affiliated tribe.

### **EO 11593, "Protection and Enhancement of the Cultural Environment," May 13, 1971**

EO 11593 directs the Federal Government to provide leadership in the preservation, restoration, and maintenance of the historic and cultural environment. Federal agencies are required to locate and evaluate all Federal sites under their jurisdiction or control which may qualify for listing on the National Register of Historic Places. Agencies must allow the Advisory Council on Historic Preservation to comment on the alteration, demolition, sale, or transfer of property which is likely to meet the criteria for listing as determined by the Secretary of the Interior in consultation with the State Historic Preservation Officer. Agencies must also initiate procedures to maintain federally owned sites listed on the National Register.

### **EO 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994**

EO 12898 directs Federal agencies to make achieving environmental justice part of their mission. Agencies must identify and address adverse human health and/or environmental effects its activities have on minority and low-income populations, and develop agency-wide environmental justice strategies. The strategy must list "programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations, ensure greater public participation, improve research and data collection relating to the health of and environment of minority populations and low-income populations, and identify differential patterns of consumption of natural resources among minority populations and



low-income populations." A copy of the strategy and progress reports must be provided to the Federal Working Group on Environmental Justice. Responsibility for compliance with this EO lies with each Federal agency.

**EO 13007, "Indian Sacred Sites", May 24, 1996**

EO 13007 provides that agencies managing Federal lands, to the extent practicable, permitted by law, and not inconsistent with agency functions, shall accommodate Indian religious practitioners' access to and ceremonial use of Indian sacred sites, shall avoid adversely affecting the physical integrity of such sites, and shall maintain the confidentiality of such sites. Federal agencies are responsible for informing tribes of proposed actions that could restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites.

**EO 13287, "Preserve America", March 3, 2003**

EO 13287 orders the Federal Government to take a leadership role in protection, enhancement, and contemporary use of historic properties owned by the Federal Government, and promote intergovernmental cooperation and partnerships for preservation and use of historic properties. The order established new accountability for agencies with regard to inventories and stewardship.